IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 18TH OCTOBER 2007 / 26TH ASWINA 1929

SA.No. 388 of 1993(D)

AS.205/1992 OF SUB COURT, THALASSERY,
OS.155/1989 OFMUNSIFF COURT, KUTHUPARAMBA.
.....

APPELLANT/ APPELLANT/ PLAINTIFF:

KUTHUPARAMBA MUSLIM JAMA-ATH,
REPRESENTED BY ITS PRESIDENT,
KUTHUPARAMBA AMSOM,
NARAVOOR DESOM, KUTHUPARAMBA.

BY ADV. SRI.M.A.MANHU,
ADV.SRI.M.A.FAYAZ.

RESPONDENT/RESPONDENT/DEFENDANT:

***1. VACHALI KRISHNAN, S/O. RAMUTY,**
MERCHANT, RESIDING AT KUTHUPARAMBA AMSOM,
NARAVOOR DESOM, KUTHUPARAMBA.P.O.,
PIN - 670 643. *(DIED)

***ADDL. R2 TO R6 IMPLEADED:**

***2. JANAKI, W/O. VACHALI KRISHNAN,**
KUTHUPARAMBA AMSOM, NARAVOOR DESOM,
KUTHUPARAMBA.P.O.,PIN - 670 643.

***3. VASANTHAN, S/O. VACHALI KRISHNAN,**
MERCHANT, KUTHUPARAMBA AMSOM,
NARAVOOR DESOM,
KUTHUPARAMBA.P.O., PIN - 670 643.

***4. VASAVAN, S/O. VACHALI KRISHNAN,**
COOLY, -DO-.

***5. BHASKARAN, S/O. VACHALI KRISHNAN,**
CLEANER, -DO- -DO-.

S.A. NO. 388/1993-D:

***6. VALSAN, S/O. VACHALI KRISHNAN, -DO- -DO-.**

***ADDL. R2 TO R6 ARE IMPLEADED AS THE LRS. OF THE DECEASED SOLE RESPONDENT AS PER ORDER DATED 06/07/99 IN CMP. 548/99.**

****IT IS RECORDED THAT PALORAN RINEESH, S/O. VASANTHAN (R3) PROPER AND NECESSARY PARTY TO THE PRESENT PROCEEDINGS AND IS IMPLEADED AS A PARTY RESPONDENT IN THE APPEAL AS PER ORDER DATED 29/09/99 IN MEMO WITH C.F. NO. 3495/99.**

****7. PALORAN RINESH,**
GRANDSON OF VACHALI KRISHNAN,
KUTHUPARAMBU AMSOM, NARAVOOR DESOM,
P.O. KUTHUPARAMBA.

****ADDL.R7. IMPLEADED AS PER ORDER DATED 13/02/2007 IN C.M.P. 2350/99 IN S.A.**

BY ADV. SRI.O.RAMACHANDRAN NAMBIAR,
SRI.K.S.GOPI,
SMT.PRASANNA H.KAMMATH.

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 18/10/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

S.A .NO.388 OF 1993

Dated 18th October 2007

J U D G M E N T

Appellant is plaintiff in O.S.155/1989 before Munsiff court, Kuthuparamba. That suit was for recovery of possession of plaint schedule building with arrears of rent. Plaint schedule building is one room of the ground floor of a four roomed building in the one cent plot in R.S.No.20/2 of Kuthuparamba village. The said property admittedly originally belonged to Valiyaparambath Pookoth Moidu. He dedicated the property for religious purpose under Ext.A3 Wakf deed dated 22/6/1962 in favour of Hidayathul Islam Sabha. The suit was filed by appellant Kuthuparamba Muslim Jama Ath through its President contending that while Hidayathul Islam Sabha was managing the Wakf property, management of the plaint schedule property as well as other Wakf properties were taken over by Kuthuparamba Muslim Juma Ath in 1972 and since then plaint schedule property is being managed by appellant Juma Ath. Admittedly the

plaint schedule room was obtained on rent by respondent from original landlord V.P.Moidu on a monthly rent of Rs.10/- as per oral lease. Later Ext.A6 registered kaichit was executed whereunder rent was enhanced to Rs.12/-. It was contended that after Ext.A3 V.P.Moidu surrendered his rights to appellant Juma Ath under Ext.A5 release deed dated 17/4/1973 and thereafter respondent has been holding over the plaint schedule room as a tenant under the Juma Ath and he was paying rent and obtaining receipts. Later contending that respondent defaulted to pay rent, appellant instituted R.C.P.3/1974 seeking an order of eviction under Sections 11(2)(b), 11(4)(i) and 11(3) of Kerala Building Lease and Rent Control Act (hereinafter referred to as 'the Act'). Ext.B3 objection was filed by respondent in that R.C.P. Under Ext.B4, order of eviction was granted under section 11(3) of the Act. Respondent challenged that order in C.M.A.93/1975 before Sub court, Thalassery. Under Ext.B6 order appeal was allowed and R.C.P was dismissed holding that appellant is not entitled to the order of eviction as respondent is entitled to the benefit of second proviso to Section 11(3). It was thereafter appellant instituted O.S.155/1989 seeking a decree for recovery of possession and arrears of rent

contending that as plaint schedule building is a Wakf property and it is exempted under the provisions of the Act as per notification issued under Section 25 of the Act. Respondent resisted the suit admitting that he obtained the building from Moidu and contending that Ext.A6 kaichit was written by Moidu and thereafter Moidu became inimical terms with respondent and it is later known that he executed Ext.A3 Wakf deed in favour of Hidayathul Islam Sabha represented by its President and shop room in his possession is also mentioned as property so dedicated. It was also contended that Ext.A3 is only a sham document which was not intended to be acted upon and subsequently a surrender deed was executed by Moidu Haji in favour of Muslim Juma Ath wherein it was stated that Moidu had taken oral lease and subsequent to the oral lease building was rented out to respondent. It was contended that in the surrender deed Hidayathul Islam Sabha has changed its name as Kuthuparamba Muslim Juma Ath and Islam Sabha had merged in it and those recitals cannot be true and Islam Sabha cannot be merged in Muslim Juma Ath. Respondent further contended that R.C.P.3/1975 was filed by Savan Haji for eviction for bonafide occupation and the order of eviction granted was

challenged in C.M.A.93/1975 and the R.C.P was dismissed and thereafter Savan Haji issued a notice demanding surrender of room for re-construction and respondent sent a reply on 21/1/1979 disputing the bonafides and pointing out the impossibility of re-construction of one room alone. It was further contended that no second Wakf deed was executed by Moidu as Ext.A3 Wakf deed is a sham document and not acted upon and Islam Sabha is not the Wakf and that Sabha cannot become Muslim Juma Ath and Kerala Wakf Board has nothing to do with Muslim Juma Ath and it has no authority to file the suit and as no Wakf was created in respect of plaint schedule property, provisions of the Act is not exempted. It was also contended that tenancy was not validly terminated and notice is defective and therefore suit is not maintainable.

2. Learned Munsiff on the evidence of PW1, DW1, Exts.A1 to A23(a), B1 to B6, X1 to X2(m) dismissed the suit holding that President of the appellant Juma Ath is not the Mutawalli of the Wakf property and under Ext.A22 Kuthuparamba Muslim Palli alone was registered under Wakf Board and appellant Juma Ath is not registered with Wakf Board and appellant failed to establish that appellant

Juma Ath is registered as a Wakf and plaint schedule building is owned by a Wakf registered with Kerala Wakf Board and so no decree for recovery of possession could be granted. Appellant challenged the decree and judgment before Sub court, Thalassery in A.S.205/1992. Learned Sub Judge on re-appreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in this appeal.

3. Appeal was admitted formulating the following substantial questions of law.

> 1) When Ext.A22 certificate issued by Kerala Wakf Board shows that Hidayathul Islam Sabha is a Wakf registered with Kerala Wakf Board and all the properties owned by Hidayathul Islam Sabha were taken over by the appellant Juma Ath and continued to be Wakf properties, whether courts below were justified in holding that plaint schedule property is not a Wakf property registered with Kerala Wakf Board.
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> 2) Whether on the evidence courts below were justified in holding that Ext.A3 Wakf deed is a sham document in the absence of evidence to support that finding.
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> 3) When Ext.A6 kaichit establish that respondent obtained plaint schedule building from Moidu on tenancy right and

Ext.A5 establishes that Moidu dedicated that property to the Wakf and Ext.A6 establish that Moidu released the right in favour of appellant Juma Ath and appellant Juma Ath instituted petition for eviction of respondent from plaint schedule property before the Rent Control Court and obtained an order of eviction which was later vacated by Appellate Authority by granting the benefit of second proviso to Section 11(3), whether courts below were justified in holding that Ext.A3 was a sham document and appellant Juma Ath is not entitled to seek recovery of possession.

4) In the light of Ext.A18 and A22 whether courts below were justified in holding that plaint schedule building is not a Wakf property and if so, whether plaint schedule property is not exempted from the operation of Kerala Building Lease and Rent Control Act and whether appellant is entitled to a decree for recovery of possession and arrears of rent.

4. Learned counsel appearing for appellant and respondents were heard.

5. Argument of learned counsel appearing for appellant is that courts below did not properly appreciate

the evidence. It was pointed out that even according to respondent plaint schedule building was originally owned by V.P.Moidu from whom respondent obtained the building on tenancy right. Under Ext.A3 V.P.Moidu thereafter dedicated the property to Hidayathul Islam Sabha and later on Hidayathul Islam Sabha handed over the management of Wakf properties as well as records of the Sabha, in favour of Kuthuparamba Muslim Juma Ath which had taken over the management of Wakf properties including plaint schedule property. It was argued that Ext.A22 establish that plaint schedule property is a Wakf property, registered with Kerala Wakf Board and Ext.A22 being a certificate issued by Kerala Wakf Board after verifying the records maintained by Wakf Board, courts below should have relied on Ext.A22 being a public document, without examining another and Ext.A22 establishes that plaint schedule property is a Wakf property. It was also argued that when Wakf properties are exempted from the operation of the Act as per notification under Section 25 of the Act and respondent admitted that he is the tenant of the building, courts below should have granted a decree for recovery of possession as the decree was sought for the Wakf. It was also argued that respondent himself paid rent to Juma Ath

as evidenced by Ext.B3 objection filed before the Rent Control court and Exts.B4 and B6 orders of Rent Control Court and Appellate Authority where status of the appellant as landlord was accepted and upheld by the court and in such circumstances courts below should have granted the decree.

6. Learned counsel appearing for respondent argued that even according to respondent Ext.A3 Wakf was created in favour of Hidayathul Islam Sabha and though PW1 deposed that Hidayathul Islam Sabha has become defunct, Ext.A22 an additional document produced by appellant before this court along with I.A.1793/2007, an application filed under Rule 27 of Order XLI of Code of Civil Procedure to receive it as additional evidence, establish that Hidayathul Islam Sabha does exist and therefore only Hidayathul Islam Sabha is entitled to claim recovery of possession and appellant Juma Ath which is not registered with Kerala Wakf Board is not entitled to claim that plaint schedule property is Wakf property or that Juma Ath was entitled to decree for recovery of possession. Relying on the decision of High Court of Calcutta in **Mohammad Soleman Molla and others v. Tasadduq Hossain and others (AIR 1935 Calcutta 623)** it was argued that office of Mutawalli is

not transferred unless the deed of dedication provides for such transfer and as Ext.A3 does not provide for the transfer of Mutawalli and so appellant cannot claim to be a Mutawalli and no decree for recovery of possession could be sought for. It was also argued that as per Ext.A23, properties of Hidayathul Islam Sabha are transferred to Muslim Juma Ath and as per Section 193 of Mohammedan Law and provisions of Kerala Wakf Act, Wakf property cannot be transferred and even if Wakf has become defunct, as per the provisions of Wakf Act properties and management is to be taken over by the Wakf Board and it cannot be taken over by Kuthuparamba Muslim Juma Ath as claimed and therefore on the strength of Ext.A23 appellant is not entitled to the decree sought for. Learned counsel relying on the decision of Apex court in **Sayed Muhammed Mashur Kunhi Koya Thangal v. Badagara Jumayath Palli Dharas Committee and others (2004 (7) SCC 708)** argued that even if Wakf Board admitted that property is being managed by Kuthuparamba Muslim Juma Ath, it is not binding on respondent and on the basis of that admission, court cannot grant a decree in favour of appellant and suit was rightly dismissed by courts below.

7. It is admitted case that respondent obtained

plaint schedule room from V.P.Moidu. Ext.A3 establishes that said Moidu dedicated this property to a Wakf. True, Hidayathul Islam Sabha is the Wakf. Ext.A22 certificate issued by Kerala Wakf Board establishes that Kuthuparamba Juma Ath Palli and its properties have been registered with Kerala Wakf Board in 1964 with Thavarayil Mayan Seethi as its Mutawalli and it was registered as 4150/RA and its administration was taken over by Kuthuparamba Muslim Juma Ath Committee. Ext.X1 certified copy of Wakf register maintained by Kerala Wakf Board establishes that Hidayathul Islam Sabha is registered with Kerala Wakf Board with registration No.433 and Mutawalli is its Secretary and registration was on 19/8/1961. It also shows that one of the items of Wakf properties so registered is one cent in R.S.No.20/2 of Kuthuparamba amsom. Learned counsel appearing for appellant pointed out that Ext.X1 establishes that the Wakf created under Ext.A3 namely, Hidayathul Islam Sabha was registered with registration No.433 before Kerala Wakf Board and plaint schedule property is one of the Wakf properties so registered. If that be so, as per notification issued under Section 25 of the Act, it is to be held that provisions of the Act are not applicable to plaint schedule property and as

respondent is not protected under the Act, suit for recovery of possession of the property before the civil court is maintainable.

8. Though respondent did not admit in the written statement that there was a dedication to Wakf contending that Ext.A3 Wakf deed was a sham document, on the evidence the said defence can only be rejected. It is on the strength of Ext.A3, Ext.A6 release deed was executed by Moidu the executant of Ext.A3 and thereafter Ext.A5 release deed was executed in favour of appellant Juma Ath who in turn instituted Ext.B2 R.C.P before Rent Control Court, Kuthuparamba, claiming order of eviction against respondent under Section 11(2)(b), 11(3) and 11(4)(i) of the Act. Ext.B3 objection filed by respondent to the said R.C.P establishes that allegation of respondent was that in spite of tendering the rent to appellant Juma Ath, rent was not received and therefore it has fallen in arrears. Ext.B4 order of the Rent Control Court in the R.C.P establishes that Rent Control Court accepted the case of appellant that appellant Juma Ath is the landlord and respondent is the tenant and an order of eviction under Section 11(3) was granted though order of eviction was vacated in the appeal filed by respondent. Ext.B6 order

of Appellate Authority establishes that order of Rent Control Court was vacated by granting the benefit of second proviso to Section 11(3) to the respondent. In such circumstances, respondent is not entitled to contend that management of Hidayathul Islam Sabha did not vest in the appellant Juma Ath or that Ext.A3 Wakf deed was a sham and nominal document. If Ext.A3 was sham and nominal document, appellant Juma Ath, the petitioner in R.C.P, would not have obtained any right over the property and could not have instituted the R.C.P. The very fact that R.C.P was filed and order of eviction was granted, which was subsequently vacated by Appellate Authority establishes that Ext.A3 Wakf deed was acted upon and not a sham document. More over, certificate issued by the Wakf Board further establishes that plaint schedule property was registered as wakf property of Hidayathul Islam Sabha and it was based on Ext.A3 Wakf deed. Therefore, finding of courts below that Ext.A3 was a sham document is unsustainable.

9. The position therefore is that respondent is a tenant of the plaint schedule building owned by Wakf. Provisions of Kerala Act of 1965 is not applicable to the building. Hence without satisfying any of the grounds

provided under the Act, suit for recovery of possession of the property after terminating the tenancy is maintainable. What remains is whether appellant Juma Ath is entitled to the decree sought for.

10. Argument of learned counsel appearing for respondent is that as per Ext.A23 minutes including the properties and records of Hidayathul Islam Sabha were transferred to the appellant Juma Ath and such a transfer is not possible either under Mohammadan Law or under Wakf Act. It was argued that under Wakf Act, if a Wakf ceased to exist, Section 26(B) of Wakf Act, 1954 provides that it is for Wakf Board to conduct enquiry and take over the management of the Wakf properties and Wakf Act does not provide for taking over Wakf by another Wakf or for transfer of Wakf to another Wakf. It was also argued that under Section 193 of Mohammadan Law, Wakf property cannot be alienated except as provided under Section 207 or 208 and under Section 207 a Mutawalli has no power to transfer, mortgage, sell or exchange wakf property or any part thereof without permission of the court and that too unless expressly empowered under the deed of Wakf. Under Section 208 Mutawalli has no power to grant a lease of Wakf property if it is an agricultural property for a

term exceeding three years and if non agricultural for a term exceeding one year, unless he has been expressly authorised by the deed of Wakf to do so or he has obtained leave of the court to do so. Argument was that as Ext.A3 does not enable such transfer, the transfer cannot be recognised by the court and on the strength of such transfer the suit will not lie. Learned counsel appearing for appellant pointed out that a Mutawalli as defined under the Act under Section 3(f) is inclusive of any other person appointed by a Mutawalli to perform the duties of Mutawalli and also any person or committee for the time being managing or administering any Wakf property and Ext.A23 establishes that management of the properties of Hidayathul Islam Sabha was taken over by the appellant Juma Ath and Ext.A22 establishes that it was recognised by Kerala Wakf Board and the suit was filed not for the benefit of the appellant Juma Ath but for the benefit of Wakf and therefore suit is maintainable.

11. A Learned Single Judge of Calcutta High Court in **Mohammad Soleman Molla and others v. Tasadduq Hossain and others (AIR 1935 Calcutta 623)** considered the question whether office of Mutawalli is heritable or transferable in the absence of a provision in the

Wakfnama. Following the general principles of law it was held that in the absence of any provision in wakfnama, the office of a Mutawalli is neither heritable nor transferable and Mutawalli has only power to nominate his successor in death bed, but he has no right to appoint his successor in his own life and in health and withdraw from the management of the wakf or transfer or assign his office during his life time and while in good health unless his powers are general or as the authorities put it unless the consignment was made to him in a general manner. Any such appointment or transfer is valid only when the appointing Mutawalli or the Mutawalli, given at the time of his appointment, either by the wakf or the kazi the power of transferring the trust to another and substituting to his own place by a sanadi wakf or wasiat should necessity arise for it. Ext.A3 shows that plaint schedule property shown therein was dedicated to Hidayathul Islam Sabha for the maintenance of Madrassa and other educational institutions run by the Islam Sabha. As no Mutawalli was appointed, it can only be said that dedication was in favour of Hidayathul Islam Sabha and that too for the purpose of taking income from the Wakf property to be utilised for running of the Madrassa and

other educational institutions of the Sabha. Evidence establish that subsequently Kuthuparamba Muslim Juma Ath was formed to take over Kuthuparamba Juma Ath Palli and all other mosque and srambi and to maintain them and also run Madrassa and all the school being run by them. Ext.A1 bye-laws establish that the bye-laws satisfy the purpose for which Ext.A3 dedication was made. Evidence also establish that Hidayathul Islam Sabha was being managed by the committee consisting of President, Secretary and members. Ext.A23 establishes that a meeting of the committee convened on 25/2/1972 had resolved to hand over the property and records to the appellant Juma Ath for the purpose of management of the Sabha. Question is whether it is a transfer in violation of the provisions of Mohammadan Law or Wakf Act as canvassed by learned counsel appearing for respondent. True, Kerala Wakf Act does not contain any provisions whereunder Wakf property could be transferred by one Wakf to another Wakf or enabling one Wakf to take over the management of another Wakf. So also, it does not contain any provision prohibiting such transfer or taking over management of another Wakf. The only provision relied on by learned counsel is Section 193 of Mohammadan Law which provides

that Wakf property cannot be alienated. Question is whether taking over the management of the Wakf can be termed as alienation prohibited under Section 193 of Mohammadan Law.

12. So long as Wakf Act does not prohibit taking over the management by the properties of one Wakf by another wakf, it cannot be said that taking over management is prohibited under the Act. So also when Mutawalli is defined under the Wakf Act inclusive of a person or committee managing or administering wakf property under Section 3(f), it cannot be said that such a management is altogether prohibited under the Wakf Act. Question is whether taking over the management is in the interest of Wakf for which the property was dedicated under Ext.A3. Evidence establishes that appellant Juma Ath was formed, as is clear from Ext.A1 bye-laws for the same purpose for which plaint schedule property was dedicated under Ext.A3. If that be so, it can only be said that appellant Juma Ath which is managing and administering plaint schedule wakf property is competent to manage the property, especially when it was recognised by Kerala Wakf Board. If that be so, appellant being in management and administration of the property is

competent to file suit for recovery of possession.

13. Then the question is whether such a suit can be instituted in the name of appellant Juma Ath or it should be in the name of Hidayathul Islam Sabha. Learned counsel appearing for respondent argued that though PW1 deposed that Hidayathul Islam Sabha has become defunct, additional document produced before this court by appellant shows that the Sabha has not become defunct and only its management is taken over by appellant Juma Ath and therefore suit should have been instituted by Wakf Hidayathul Islam Sabha and not by appellant Juma Ath. Argument of learned counsel relying on the decision of the Apex court in Sayed Muhammed Mashur Kunhi Koya Thangal's case (supra) is that even an admission of the Wakf Board in the written statement will not enable plaintiff to get a decree, without establishing the authority. Apex court was considering a suit for recovery of possession of the property on the strength of title contending that it is a Wakf property and that plaintiff committee is Mutawalli under the management of the mosque. In that suit written statement was filed by wakf Board to the effect that plaintiff committee was actually paying annual contribution to the Board and was acting as Mutawalli.

Apex court held that when plaintiff specifically pleaded that he was entitled to a declaration of title and for recovery of possession of plaints schedule property based on the agreement, it can be granted only on the basis of validity of the agreement and validity of transfer of Mutawalli in its favour and decree cannot be granted on the basis of statement of Wakf Board in the written statement. Facts are entirely different herein. Admittedly respondent is a tenant under V.P.Moidu who dedicated the property in favour of Hidayathul Islam Sabha. Thereafter, Hidayathul Islam Sabha handed over the management of Wakf property to appellant Juma Ath. Respondent paid rent to appellant. It could only be by recognising the transfer of management to the appellant who is seeking a decree for recovery of possession. No decree for declaration that appellant is either Mutawalli or Wakf was sought. In such circumstances, courts below should have granted a decree as sought for. In the result, appeal is allowed. Decree and judgment in O.S.155/1989 on the file of Munsiff court, Kuthuparamba as confirmed in A.S.205/1992 are set aside. Suit stands decreed as follows.

14. Respondents who are legal heirs of original

defendant are directed to surrender vacant possession of the plaint schedule building within two months from today. Appellant/plaintiff is entitled to realise Rs.432/- being the arrears of rent till the date of the suit and mesne profit at the rate of Rs.12/- per month from the date of the suit till surrender with interest at 6% per annum from the respective due dates.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.388 OF 1993

18th October 2007

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